

1 UNITED STATES DISTRICT COURT

2 DISTRICT OF MASSACHUSETTS

3 No. 1:13-cr-10164-WGY-ALL

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5
6 UNITED STATES OF AMERICA

7 vs.

8
9 MICHAEL BOURQUE, et al

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12 *****

13
14 For Hearing Before:
15 Judge William G. Young

16 Status Conference

17
18 United States District Court
19 District of Massachusetts (Boston)
20 One Courthouse Way
21 Boston, Massachusetts 02210
22 Thursday, February 6, 2014

23 *****

24 REPORTER: RICHARD H. ROMANOW, RPR
25 Official Court Reporter
United States District Court
One Courthouse Way, Room 5510, Boston, MA 02210
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1 P R O C E E D I N G S

2 (Begins, 3:00 p.m.)

3 THE CLERK: Now hearing Criminal Matter
4 13-10164, The United States of America versus Bourque,
5 et al.

6 THE COURT: Good afternoon. With Mr. Romanow
7 here, I think it might be helpful if we all introduced
8 ourselves again, starting with the government.

9 MR. YOON: Good afternoon, your Honor.
10 Michael Yoon for the Government.

11 THE COURT: And who you represent.

12 MR. McCORMICK: Good afternoon, your Honor,
13 Edward McCormick representing John Kinney and standing
14 in for Attorney Robert Griffin as well today.

15 THE COURT: Who represents -- Mr. Griffin
16 represents?

17 MR. McCORMICK: Mr. Yancey, your Honor.

18 MR. YOON: Mr. Yancey.

19 THE COURT: Then Mr. Yancey. Thank you.

20 MR. McBRIDE: Good afternoon, Your Honor,
21 Devin McBride on behalf of Mr. Raymond Panaggio, who is
22 present, and I'm standing in for William Korman.

23 THE COURT: Who represents?

24 MR. McBRIDE: Who represents Tom Ehwa.

25 THE COURT: Thank you.

1 MR. BUDREAU: And, your Honor, James Budreau
2 on behalf of Corey Assencoa.

3 THE COURT: The second row?

4 MR. SWOMLEY: Thomas Swomley on behalf of
5 Robert Hagenaaars.

6 MR. DEMISSIE: Derege Demissie, I represent
7 Philip Goolst. I'm also standing in for Attorney Kevin
8 Barron, who represents Mr. Akasa.

9 THE COURT: Thank you.

10 MR. DOMBROWSKI: Good afternoon, your Honor,
11 John Dombrowski, representing Mark Ouellette.

12 MR. APFEL: Good afternoon, your Honor, David
13 Apfel, and with me is Robyn Schwartz from my office on
14 behalf of Mark Newton.

15 MR. PARKER: Peter Parker for Frank McGuire.
16 Good afternoon, your Honor.

17 THE COURT: And we'll go around the outer ring
18 here. Oh, you're at a table, yes, of course.

19 MS. FELDMAN-RUMPLER: Leslie Feldman-Rumpler.
20 Good afternoon, your Honor. On behalf of Michael Roy.

21 THE COURT: Thank you.

22 MR. SCULLY: Good afternoon, your Honor, Liam
23 Scully for Sean Cotter.

24 MR. PALMER: John F. Palmer for Brian
25 Chisholm. Good afternoon, your Honor.

1 MR. CONNOLLY: Good afternoon, your Honor,
2 Bill Connolly for Michael Bourque.

3 THE COURT: Well, thank you for attending on
4 this session. You filed this motion. The motion for a
5 status conference makes perfect sense. The motion to
6 continue the trial, I am considerably less receptive
7 to. But let's work through step by step.

8 First, there is a not insignificant motion to
9 suppress that many of you join in. And let's have the
10 clerk suggest a prompt time for the hearing of that
11 motion. I see no need to have an evidentiary hearing.
12 The matters all seem to be straightforward. And the
13 question is the implications of the statute in light of
14 the undisputed facts as to what happened.

15 THE CLERK: Friday, February 14th at 9:00 a.m.

16 THE COURT: How is that? Is that --
17 You're going to argue it, Mr. Apfel?

18 MR. APFEL: I am, your Honor. That date is
19 fine.

20 THE COURT: Fine. And, Mr. Yoon, that's all
21 right with you?

22 MR. YOON: Yes, sir, of course.

23 THE COURT: All right. So that's when we'll
24 hear that. That may require an opinion, but I believe
25 that I will be able to rule on the matter promptly.

1 So if I grant the motion, um, we probably won't
2 have to worry about whether I'll continue the trial
3 because the government will appeal. If I -- well, I'm
4 not inviting it, but if I deny the motion, then let's
5 consider where we stand.

6 Now, one thing that was said in this motion that I
7 frankly don't understand, um, and I'll read it: "Others
8 are prepared to plea but will require evidentiary
9 hearings on the issues of drug quantity and sentencing
10 enhancements." Now, I don't understand that for this
11 reason.

12 Surely the government understands, and the rest of
13 you all should understand, that, um, my interpretation
14 of the Constitution is that any of these, quote,
15 "sentencing enhancements," save for prior convictions,
16 criminal history, the government is going to have to
17 prove those and the government is going to have to prove
18 those at the time of trial to the jury with evidence on
19 proof beyond a reasonable doubt.

20 So I don't -- I can conceive of the situation --
21 actually Ms. Feldman-Rumpler and I had a case where it
22 didn't actually eventuate this way, but one of the
23 things I'm willing to do is take a plea and, in essence,
24 hold a jury-waived hearing on just these matters, take
25 evidence at that hearing, hold the government to its

1 burden of proof unless the defendant agrees that it can
2 be a lesser burden of proof, um, and then figure out how
3 the discount for saving the government time and money
4 works into the procedure. But if we're going to go to
5 trial, the government is going to prove everything.
6 Everything. No one is going to be sentenced beyond what
7 they either admit in a plea or is proved at the trial.

8 Now, Mr. Yoon, you understand that?

9 MR. YOON: Yes, sir, of course.

10 THE COURT: Of course. So why -- so what are
11 we talking about here, what sort of evidentiary hearings
12 are we talking about other than trial?

13 (Pause.)

14 THE COURT: I hear none. All right.

15 MR. CONNOLLY: Your Honor, I'll address it
16 just because I filed the motion. I don't anticipate a
17 trial at this point, but I think that raises one of the
18 issues that the lawyers wanted to address with the
19 Court, and that is if an individual chooses to plead
20 guilty to the substantive offense but wants a jury to
21 hear evidence and demand proof beyond a reasonable doubt
22 on the enhancements, how does that trial look? And
23 secondly --

24 THE COURT: An excellent question that
25 deserves an answer. That trial looks like this. I'm

1 going to assume everyone is going to trial. Well, one
2 can, based on this, assume that not everyone will go
3 trial. At the moment it's a joint trial. So if someone
4 pleads, that's got to be a separate proceeding. I'll
5 give a separate jury trial, the jury will know that the
6 elements have been established because they have been,
7 and the question is what's attributable to him? That's
8 the one -- there may be other enhancements, but maybe
9 there's a weapon or something.

10 We have the trial. If it results in an acquittal,
11 again, evidence, proof beyond a reasonable doubt, if it
12 results in an acquittal as to those enhancements, I
13 don't consider them at all in sentencing. If there is a
14 range and I give the jury a verdict that has the various
15 ranges and the jury checks it off, the one that has been
16 proved, I've done that, then I sentence in accordance
17 with the jury verdict.

18 What's in play though is the discount. If someone
19 puts the government to their proof, which is their
20 constitutional right, then there may not be a
21 three-level or a two-level discount, because we've spent
22 the time proving something the government claims that it
23 can prove. However, when I say the discount's in play,
24 go to trial like that and it results in a defendant's
25 verdict as to the enhancement, then the discount as to

1 the plea stands, because they've pled. That's my answer
2 to the question.

3 So if you want that, I'm amenable to that, and
4 that will be a separate proceeding. Um --

5 MR. SWOMLEY: Could I ask a question, your
6 Honor?

7 THE COURT: Yes, please.

8 MR. SWOMLEY: Just in terms of the difference
9 between a plea and a jury-waived trial, what you're
10 saying is, um, distinguishing what you just said from
11 that scenario, if there was a plea --

12 THE COURT: I can do the same thing
13 jury-waived.

14 MR. SWOMLEY: But if it's jury waived, would
15 you be providing the discount, as it were, regardless?

16 THE COURT: I would hear arguments on that,
17 but I think the discount is measured by the time and
18 expense to the government. It cannot in any way, um, be
19 evaluated by the, um, resources of the Court, because
20 otherwise it would infringe on constitutional rights.
21 The only way the discount -- I'm very skeptical of it.
22 I'm so careful never to use the term "acceptance of
23 responsibility." You all know it. The government knows
24 it. It's not people genuinely accepting responsibility,
25 it's their bargaining out for the best they can get, and

1 then I'll listen to their allocution and make individual
2 determinations. And so it's got to be -- the only way
3 that can be constitutional is to spare the government
4 the burden and expense of a trial.

5 My job is to do the judicial work, day in and day
6 out. So it's not my time that has any bearing on
7 sentencing whatsoever, it's the government's time.

8 MR. SWOMLEY: Thank you.

9 THE COURT: Good question.

10 Yes, Mr. Apfel.

11 MR. APFEL: Your Honor, just a point of
12 clarification. I'm not sure I understand, so I just
13 want to make sure that we're all on the same page. It's
14 clear that if people go to trial, trial, no discount
15 whatsoever?

16 THE COURT: I can't recall -- actually the way
17 the guidelines are written, conceivably there could be
18 one. I never bargained, but as I recall my own
19 practices, as a matter of historic fact, I don't ever
20 recall giving it after a trial.

21 MR. APFEL: If an individual pleads, however,
22 but still maintains the right to contest drug weight or
23 drug quantity, um, it's obviously the government's
24 prerogative as to whether or not the person gets the
25 third point for a discount, but the first two points on

1 a discount I would think that the individual who pleads
2 would get those two points even if he goes forward.

3 THE COURT: I'm happy to hear that. I am not
4 clear on that. If he goes forward and we spend three
5 days on doing drug weight.

6 MR. APFEL: But it's three days on drug weight
7 as opposed to what might be five days or three weeks in
8 --

9 THE COURT: I'll hear all of those things in
10 an adversary presentation. And your question is a good
11 one and I'm trying to be transparent. But while I'm
12 confident to the extent of answering the first two
13 questions, I'm not estopped in answering your question,
14 because you're telling me I've got to give the two?
15 Well, if we spend three days and they come up with a
16 drug weight that the government intended at the
17 beginning and you say, "Well, he still gets the two
18 levels," don't assume that I have reached that
19 conclusion, or the opposite conclusion.

20 MR. APFEL: Understood.

21 Even in the context of a plea --

22 THE COURT: Correct.

23 MR. APFEL: -- a signed plea agreement with
24 the government --

25 THE COURT: Correct.

1 MR. APFEL: -- in which the government has
2 agreed to the 2-point discount?

3 THE COURT: You're asking precise questions to
4 which I do not have precise answers and I leave it to
5 the adversary system. Where I have an answer, I'm happy
6 to share it.

7 Are there other questions? All right. I see --

8 MR. PALMER: I'm sorry. What is the Court's
9 position on C-pleas?

10 THE COURT: I take C-pleas. There was a time
11 when I didn't. I now take them except for -- and again
12 I shouldn't be so firm, but I've now written how
13 skeptical I am of taking them with corporate
14 defendants. But that has nothing to do with this case.

15 MR. PALMER: Thank you.

16 THE COURT: I took one as recently as this
17 morning and of course the issue is am I ultimately going
18 to accept it? And now close on 30 years, if my memory
19 serves, I've rejected it twice. I just wouldn't go
20 along with it. But the great majority of C-pleas, where
21 they are negotiated after I've read the presentence
22 report, ultimately I've accepted. I'm just talking
23 historically.

24 All right. I see no reason to continue the
25 trial. I expect you all to do the job once we've had

1 the hearing on the 14th. We'll figure out a final
2 pretrial conference. As a matter of fact --
3 Mr. Parker?

4 MR. PARKER: Your Honor, I took the short
5 straw of arguing the motion and I don't think the Court
6 is aware, um, but the lead defendant, Bourque, um, just
7 cooperated. We just learned about it this week. We
8 don't even have a plea agreement, an outline. We have
9 nothing about what he said. Um, Mr. Connolly
10 represented him. You know, if he was going to trial, we
11 expected him to be lead counsel, more or less in this
12 case, and carry the ball and do the heavy work. He's
13 not going to be doing that. That may or may not fall on
14 me given the government's view of where my client is in
15 the hierarchy.

16 We have a lot of work to do if we are to digest
17 what Bourque has to say, compare it to wiretaps,
18 investigate him, and be in a position to cross-examine
19 him. I've tried cases with your Honor before, your
20 Honor knows, I hope, how thorough I prepare and how much
21 I dig into this. If we found out about it or if it
22 happened months ago, I'd be ready for trial. I can't be
23 ready for trial with Bourque as the government witness.

24 THE COURT: I think it's too early to draw
25 that conclusion. Let's hold off till after we've had

1 the motion to suppress on the 14th. Let's have the --
2 why don't we do the final pretrial conference on that
3 day as well and I'll entertain it, then we'll know a
4 little more about this situation and I can rule in a
5 more prudential way. I do hear you, Mr. Parker.

6 So shall we do the final pretrial conference at --
7 do you all expect to come for this motion to suppress
8 hearing or should we put that on for 2:00 that day?

9 MR. DEMISSIE: I'll be here.

10 THE COURT: What's your preference?

11 MR. DEMISSIE: To be present.

12 THE COURT: Wait a minute.

13 (Pause.)

14 THE COURT: Oh, it won't work at 2:00. So
15 shall we say we'll have the hearing on the motion to
16 suppress and after that we'll go right into a final
17 pretrial conference? All right. And I'll entertain
18 motions at the time.

19 MR. DEMISSIE: What time is that, Judge?

20 THE COURT: 9:00.

21 MR. SWOMLEY: Your Honor, I had represented
22 the last time we were in front of you that I am
23 scheduled to start a murder trial on March 3rd, the same
24 day that you scheduled this. That is still the case. I
25 may be out of this case before then, but I just wanted

1 to let the Court know.

2 THE COURT: Your candor is always appreciated,
3 but for now we'll run for luck and see where we stand.

4 Now, I have -- Mr. Apfel?

5 MR. APFEL: One other -- two issues on the
6 issuance of a continuance, your Honor. In -- one is
7 that there is still, at least as to my client, some
8 important outstanding discovery independent of the
9 information related to the recent discovery that we've
10 all had where Mr. Bourque is cooperating.

11 Mr. Yoon tells me that the discovery I've been
12 asking for will be in my hands no later than tomorrow.
13 That should obviate that problem. But if it's not,
14 that's an issue for us.

15 The second is a -- is in the nature of a personal
16 plea. I did not attend the last status conference and I
17 inexcusably didn't have one of my associates attend it
18 either, I had someone stand in for me. If I had
19 attended, I would have explained to your Honor that
20 March 3rd would not be a great date for me in the event
21 that the trial goes past two weeks, and that's because I
22 have a longstanding obligation to take my wife to Europe
23 on March 14th for her 60th birthday that has been
24 planned for over six months now. And I think that if I
25 miss that date, it would be on pains and penalty of

1 divorce.

2 THE COURT: We will run for luck, Mr. Apfel.

3 MR. APFEL: I thought that would be your
4 response.

5 THE COURT: Right. We will see how it works
6 out.

7 Now, I have a couple of questions. The
8 defendants, as is their right, filed various things ex
9 parte and I don't think I'm revealing anything to ask
10 the government a couple of questions. And again this
11 may be -- it would be helpful to me and that's
12 sufficient.

13 Certain of these defendants are worried about you
14 calling experts and the experts that they suggest that
15 you may call are some expert or experts who are going
16 to, um -- because this appears to be a wiretap case and
17 people are talking in code words, and they think you
18 have someone -- now I guess they've got Bourque, so
19 maybe that will solve it, but someone is going to
20 de-code the code, is that so?

21 MR. YOON: There won't be expert testimony.
22 We will not be looking to enter that. We'll do that in
23 another way. But it won't be expert testimony.

24 THE COURT: It won't be expert testimony?

25 MR. YOON: No, your Honor.

1 THE COURT: I mean you'll have someone who
2 knows decipher the code?

3 MR. YOON: Yes, your Honor.

4 THE COURT: Another thing they're worried
5 about is you're going to put on some expert as to the
6 street value of the drugs promised or involved?

7 MR. YOON: No.

8 THE COURT: Maybe you're not and these answers
9 will be sufficient to aid me.

10 MR. YOON: No, your Honor.

11 THE COURT: You're not. Good. Thank you.

12 Well, those are my questions. We'll meet on -- at
13 9:00 on the 14th of February. We'll start with the, um,
14 motion to suppress. We'll go on to a final pretrial
15 conference.

16 Should there be resolution of any of these cases,
17 in whole or now that, as the question's raised, in part,
18 simply call Ms. Gaudet and it will aid all of us if I
19 set it up promptly, and I will do the very best I can
20 promptly to entertain it.

21 MR. APFEL: One other question, your Honor.

22 THE COURT: Right.

23 MR. APFEL: I guess I think the question that
24 you just put to Mr. Yoon was prompted, at least in part,
25 by an ex parte motion on my part.

1 THE COURT: I didn't say that.

2 MR. APFEL: And I don't know if others filed
3 similar motions, but I know I filed one that raises
4 those issues. So I would ask your Honor to put one
5 additional question to Mr. Yoon.

6 If he doesn't intend to call any experts on the
7 issue of the codes or the meaning of code words or
8 street value of drugs, does he intend to have the
9 agents, the case agents, whether they're labeled as
10 experts or not, offer interpretative testimony as to --

11 THE COURT: I'm not going to ask him that
12 question. People are entitled to prepare their case.
13 You know that I will be extraordinarily skeptical of
14 anyone trying to put in backdoor expert testimony,
15 interpretative testimony. I'm very hostile to such
16 testimony. If he has any witness, government or
17 otherwise, who has primary knowledge -- I just give some
18 examples. If there's an informant here and that
19 informant was in on the deal and knew how much to supply
20 or how much to pay based upon such-and-such a code, that
21 decodes that part of the code. If they're fronting
22 money for controlled buys and it's in the area within a
23 year, it sounds to me like that's primary evidence of
24 the street value of x amount of y. And witnesses who
25 themselves observe it or front the money are able to

1 testify to what they did.

2 I should not give advisory opinions and this does
3 not foreclose anyone from doing anything that the rules
4 allow. But I hope that's helpful.

5 We'll recess and we'll resume on the 14th.

6 (Pause.)

7 THE COURT: Oh, before you leave, wait a
8 minute. Ms. Gaudet properly raises this.

9 We can hold these hearings like this as a status
10 conference, I mean, without clients. Now, a hearing on
11 a motion to suppress is a little different. Even though
12 I -- and no one is pressing me, I'm not going to take
13 evidence, I will have read the briefs, I'll be prepared
14 for argument.

15 So, raise your hand, who has clients in custody
16 here? (Counts.) 1, 2, 3, 4. So for the rest of you,
17 they're welcome, because they can get here on their own,
18 but they're not required to be here. For the ones who
19 are in custody, I don't imagine that Mr. Burke needs to
20 be here --

21 Correct, Mr. Connolly?

22 MR. CONNOLLY: Correct, your Honor.

23 THE COURT: Do the rest of you, any of you,
24 press that your clients be here?

25 MR. MCCORMICK: Your Honor, Edward McCormick

1 for Mr. Kinney. Your Honor, I plan to see Mr. Kinney
2 tomorrow, could I inform the clerk of that then?

3 THE COURT: Precisely.

4 Ms. Feldman-Rumpler?

5 MS. FELDMAN-RUMPLER: On behalf of Michael
6 Roy, I think he should be here.

7 THE COURT: We'll see that he is. And there
8 was one other?

9 MR. PALMER: Brian Chisholm, your Honor. I
10 have the same request.

11 THE COURT: You check with him and let
12 Ms. Gaudet know.

13 MR. DEMISSIE: Your Honor, I'm standing in for
14 Mr. Kevin Barron. I'm not sure if Mr. Akasa is in
15 custody. If he is, then I'll reserve the Attorney's
16 right to let Ms. Gaudet know.

17 THE COURT: And it's fine if you do it that
18 way. Thank you, all. We'll recess.

19 (Ends, 3:30 p.m.)
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C E R T I F I C A T E

I, RICHARD H. ROMANOW, OFFICIAL COURT REPORTER,
do hereby certify that the foregoing record is a true
and accurate transcription of my stenographic notes,
before Judge William G. Young, on Thursday, February 6,
2014, to the best of my skill and ability.

/s/ Richard H. Romanow 07-08-14

RICHARD H. ROMANOW Date